

Noreen Rucinski

Dir. Strategic Business Development
Schneider Rucinski Enterprises
3344 N Mt. View Dr
San Diego CA 92116
619-282-7977
Plaintiff in Pro Per
Appearing *pro se*

FILED

08 MAR -7 PM 4:25

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *CR* DEPUTY

UNITED STATES DISTRICT COURT

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SCHNEIDER RUCINSKI ENTERPRISES,)

Plaintiff,)

vs.)

Case No.: 08 CV 0138 WQH POR

Date: March 24, 2008
Time: 11:00 a.m.

Judge: Hon. William Q Hayes

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

TOUCH ASIA OUTSOURCING)
SOLUTIONS, INC., dba TOUCH ASIA)
CALL CENTER, INC.; RUDY NGAW;)
STRATASOFT, INC. PACIFIC CALL)
CENTERES; LANE MCCARTY)
individually and as an employee and/or)
agent of STRATASOFT, INC.; JASON)
PACE individually and as an employee)
and/or agent of STRATASOFT, INC.;)
MIKE BRIDGES individually and as an)
employee and/or agent of STRATASOFT,)
INC.; MICHEL BRIDGES, JR.,)
individually and as an employee and/or)
agent of STRATASOFT, INC.; INX, INC.,)
a Texas Corporation formerly known as I-)
SECTOR CORPORATION; COLO 6 LLC,)
a California Corporation, and NAVROZ)
HAJI, an individual, and DOES 1 through)
20, inclusive,)

Defendants.

SCHNEIDER RUCINSKI ENTERPRISES ("SRE") respectfully submits this
Memorandum in Opposition to Defendant's Motion to Dismiss.

INTRODUCTION

Through an Asset Purchase Agreement dated MAY 11, 2004, as SRE entered into
an agreement with INX in which INX through it's agent STRATASOFT agreed to

1 sell equipment to SRE in the sum of \$128,000. Plaintiff paid INX's agent
2 STRATASOFT \$128,000.

3 ***I. All rights and ownership of Telephony servers and software equipment,***
4 ***including source code, Licenses, source documentation, source listings***
5 ***and annotations and all equipment listed below::***

- 6
- 7 • 1 – StrataDial.VC2 Telephony Server
 - 8 • 1 – 120 Agent Station Ports
 - 9 • 1 – 360 Telephone Line Ports
 - 10 • 1 – StrataDial.VC2 Supervisor Voice Monitoring Unit
 - 11 • 1 – StrataDial.VC2 Engine Software 120 Agent by 360 Line
 - 12 License
 - 13 • 1 – StrataDial.VC2 List Management and Reporting System
 - 14 License
 - 15 • 1 – StrataDial.VC2 Prospect Management and Reporting
 - 16 System License
 - 17 • 120 – Telephone Sale Representative (TSR) Agent Licenses
 - 18 • 1 – DynaCall Software License
 - 19 • 2 - StrataQA Software Licenses
- 20

21 In addition to the collateral equipment, as follows:

- 22 • Excel Hardware switches (32 T-1s & 24 E-1s) [Serial 086068]
- 23 • 1 -- EXPU Card with I/O
- 24 • 1 -- Power Supply Card
- 25 • 1 -- SS7 LC Card
- 26 • 1 – ISDN Pri Card
- 27
- 28

1 II. All of [SRE's] rights pertaining to any hardware and software licenses and any
2 other contracts to which [INX/STRATASOFT] is a party or by which it is bound
3 and which pertains to the "EQUIPMENT"

4 Subsequent to the Asset Purchase Agreement INX through it's agent
5 STRATASOFT represented the following:
6

- 7
- 8 a) That STRATASOFT, specifically through its agents JASON
9 PACE and MICHAEL BRIDGES, in the event of a default on
10 the lease agreement with TOUCH ASIA, would assist Plaintiff
11 in reselling the equipment to "any of it's sales in the
12 pipeline"
 - 13 b) that STRATASOFT maintained specific policies and
14 procedures for this type of transaction - i.e., a sale to a
15 lessor and/or leasing company;
 - 16 c) that STRATASOFT would follow its specific policies and
17 procedures with respect to the negotiation and sale of
18 Equipment with Plaintiff;
 - 19 d) that STRATASOFT fully understood and agreed that it was
20 selling the Equipment to Plaintiff;
 - 21 e) that STRATASOFT fully understood and agreed that Plaintiff
22 would thereafter lease the Equipment to TOUCH ASIA and
23 NGAW;
 - 24 f) that free and clear title to the Equipment would vest in
25 Plaintiff's name;
 - 26 g) that PLAINTIFF, as owner of the Equipment, would have full
27 access to and **control of the toggle and/or software keys**
28 (as described in the services and maintenance contract) **and**

1 **could fully control when they were activated or**
2 **deactivated;**

- 3 h) that no written contract was needed for this transaction;
- 4 i) that upon payment and clearance of funds to STRATASOFT,
- 5 Plaintiff would receive a bill of sale/purchase order reflecting
- 6 the sale to Plaintiff and ship-to/installation at TOUCH ASIA;
- 7 j) that after payment and installation, STRATASOFT would
- 8 enter into a contract with TOUCH ASIA/NGAW for service
- 9 and maintenance of the Equipment only;
- 10 k) that a copy of the service and maintenance contract would
- 11 be sent to Plaintiff after the serial numbers on the
- 12 Equipment were confirmed and the Equipment installed at
- 13 TOUCH ASIA;
- 14 l) that a purchase order and cancelled checks was proof of
- 15 ownership of the Equipment;
- 16 m) that the Equipment would not be installed at TOUCH ASIA
- 17 until a waiver was signed by the landlord;
- 18 n) that after STRATASOFT received payment for installation
- 19 and the funds cleared; it would send an invoice to Plaintiff
- 20 for the remainder of the balance due for the purchase of the
- 21 Equipment.

22

23 Plaintiff wishes to further state as a matter of fact that on or about June 28th,

24 2004 INX through it's agent STRATASOFT conspired to defraud SRE of their

25 ownership rights of the "Equipment", by shipping the "Equipment" at dispute,

26 over state lines to SRE's client TOUCH ASIA. During which time

27 INX/STRATASOFT illegally transferred SRE's ownership of said equipment to

28 SRE's client TOUCH ASIA.

STANDARD OF REVIEW

In considering a motion to dismiss, a court must take the allegations of the complaint at face value and must construe them favorably to the plaintiff. The allegations in the plaintiff's complaint are presumed true. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). A court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff could prove no set of facts supporting the claim which would entitle plaintiff to relief. *Huxall v. First State Bank*, 842 F.2d 249, 250- 51 (10th Cir. 1988). The court's function on a Rule 12(b)(6) motion is merely "to assess whether the plaintiffs complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller*, 948 F.2d at 1565.

ARGUMENT

INX/STRATASOFT claims in its Motion to Dismiss that the complaint on its face fails to allege facts sufficient to establish subject matter jurisdiction. SRE argues that this court does have subject matter jurisdiction as the amount in dispute is greater than \$75,000 and is proper pursuant to 28 U.S.C. Sec. 1332. The claims in SRE's complaint arise out of inter-state transactions. INX is a corporation located and doing business in Texas, SRE is a company doing business in California. As alleged above INX/STRATASOFT sent the "Equipment" to SRE's client TOUCH ASIA in California over state lines. All transactions/shipping were via us mail, private mail carrier and by email traveling over state lines. Therefore the court does have subject matter jurisdiction over this dispute and the defendant claim of lack of subject matter jurisdiction should be dismissed.

INX also claims that SRE has not alleged damages with sufficient particularity under Rule 12(b)(6) of the Federal Rules of Civil Procedure to support its under which relief can be granted. Again, INX, has attempted to elevate a simple standard to something it is not. Rule 12(b)(6) only requires a plaintiff to plead damages in a manner that apprises the defendant of the claims at issue and the damages alleged to flow from those claims.

1
2 **I. SRE IS THE OWNER OF THE INX/STRATASOFT "EQUIPMENT"**
3 **PURSUANT TO THE ASSET PURCHASE AND INX/STRATASOFT'S**
4 **STATEMENTS TO SRE.**

5 In its Complaint, SRE alleges in several places that it is the sole and exclusive
6 owner of all rights, title, and interest in the "Equipment". SRE's allegations,
7 together with the plain language of the Lease agreement, emails and Checks
8 submitted to INX/STRATASOFT that were cashed, are sufficient to establish
9 SRE's ownership of the "Equipment". INX/STRATASOFT asks this Court to
10 ignore the allegations in SRE's Complaint and declare that SRE does not own the
11 "Equipment" because INX/STRATASOFT claims that the Asset Purchase is not
12 sufficient to transfer ownership.

13 The Asset Purchase, is clearly sufficient. The issue, if any, is an interpretation of
14 the actions of all parties under the transaction - not whether a writing exists
15 transferring ownership. INX/STRATASOFT, of course, ignores their own and
16 their agents own actions in its Answer and Motion.

17 INX also made representation to SRE that it would "deliver" the equipment to
18 the Lessee on the Closing Date while retaining SRE's ownership of the
19 "Equipment". INX/STRATASOFT's argument is meritless. The allegations in the
20 Complaint make it clear and must be accepted as true. INX/STRATASOFT's
21 Motion should be denied.

22 **II. SRE HAS SUFFICIENTLY ALLEGED DAMAGES.**

23 INX/STRATASOFT also claims SRE's Complaint should be dismissed because
24 SRE has not sufficiently alleged damages. In order to state a claim damages have
25 to be shown that it was "naturally and necessarily result from the harm done".

26 In its complaint, SRE has pled precisely as to which damages it is asking for.

27 Paragraph 26 of SRE's Complaint reads as follows:
28

- a. For an order that STRATASOFT and INX and its agents specifically perform the terms of the Agreement and deliver the bill of sale/purchase order reflecting the sale of the Equipment to Plaintiff;
- b. For an order that STRATASOFT and INX and its agents specifically perform the terms of the Agreement and deliver a service and maintenance contract for the Equipment; and,
- c. For an order that STRATASOFT and INX and its agents specifically perform the terms of the Agreement and deliver an invoice for the remainder of the balance due for the purchase of the Equipment.
- d. In the event the court does not order Specific Performance of the contract, for compensatory damages in the amount of \$555,000.00 for breach of contract;
- e. For the principal sum of \$555,000.00 plus interest, late fees, penalties and other reasonable charges;
- f. For reasonable attorneys' fees according to proof;
- g. For immediate possession of the equipment and software access remotely.
- h. For reasonable value of the Equipment in an amount to be proven at the time of trial;
- i. For all sums expended by Plaintiff in seeking the return of the Collateral , in an amount to be proven at the time of trial;
- j. For general damages in an amount to be proven at the time of trial;
- k. For special damages in an amount to be proven at the time of trial;

- 1 l. For compensatory damages in an amount to be proven at the
2 time of trial;
- 3 m. For exemplary and punitive damages in an equitable amount
4 to be proven at the time of trial;
- 5 n. For a judicial determination by the court of the rights and
6 duties of the Parties; specifically that Plaintiff is the rightful
7 owner of the Equipment;
- 8 o. For the principal sum of \$555,000.00 plus interest, late fees,
9 penalties and other reasonable charges;
- 10 p. For the imposition on an implied and/or constructive trust
11 against Defendants, and each of them, for the full monetary
12 and material value, including all unpaid fees, costs and
13 interest thereon, concerning the items, equipment, goods and
14 services which are the subject of this action;
- 15 q. That the Court issue appropriate injunctive relief and orders
16 as the Court may deem just, equitable and proper;
- 17 r. For general damages in an amount to be proven at the time of
18 trial;
- 19 s. For special damages in an amount to be proven at the time of
20 trial;
- 21 t. For compensatory damages in an amount to be proven at the
22 time of trial;
- 23 u. For costs of suit, legal and attorneys' fees herein incurred.
- 24 v. For interest per the parties' agreement/lease from the date of
25 Defendants' breach thereof;
- 26 w. For additional monthly rental from the date of breach of the
27 ELA, to the present, and for each successive rental period
28 thereafter, in addition to the period's thereafter upon which

1 Defendant's unlawfully remained in possession, pursuant to
2 the parties' agreement/lease.

3 x. For all legal interest on all damages incurred from the date of
4 Defendants' cause thereof;

5 y. For such other and further relief as the court may deem just
6 and proper.

7
8 SRE has pled with sufficient particularity the damages it incurred and is
9 continuing to incur as a result of INX/STRATASOFT's breach of SRE's title to the
10 "Equipment". SRE's complaint has set forth the specific loss that SRE further
11 suffers if its unable to ascertain the truth of ownership in the "Equipment"
12 because of INX/STRATASOFT's wrongful acts. SRE's allegations are sufficiently
13 particular to "apprise" INX/STRATASOFT of SRE's claims. Indeed,
14 INX/SRATASOFT knows exactly what is at issue in this case and, as alleged in
15 SRE's Complaint, INX/SRATASOFT has acted with the specific intent of causing
16 SRE the precise type of damages SRE has alleged. SRE has met the pleading
17 requirements for its claim of title in this action. INX/STRATASOFT's Motion to
18 Dismiss should be denied.

19 **CONCLUSION**

20 For all of the foregoing reasons, INX/STRATASOFT's Motion to Dismiss should
21 be denied. SRE has properly alleged a claim for of title under the law.

22 DATED this 7 th day of March 2008

23
24 By:  _____

25
26 **CERTIFICATE OF SERVICE**
27
28

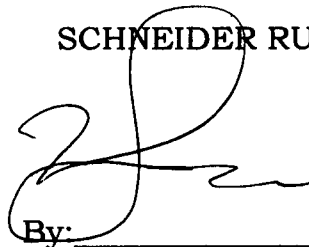
1 I HEREBY CERTIFY that on this 7th day of March 2004, I caused to be mailed a
2 true and correct copy of the foregoing to the following by the method described
3 below:
4
5
6

7 *By Mail Delivery:*
8
9

10 *BY U.S. Mail, postage prepaid:*
11 *Mar 7 - 2008*
12
13

14
15
16 Dated: March 7, 2008

17 SCHNEIDER RUCINSKI ENTERPRISES

18
19
20 

By: _____

21 Noreen Rucinski,
22 Dir. Strategic Business Development
23
24
25
26
27
28